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Montana's Rape-Shield Statute: No Time to Waste!

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COMMENTS

MONTANA'S RAPE-SHIELD STATUTE: NO TIME TO WASTE!

James G. McGuinness*

Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .[1]

—Shakespeare

I. INTRODUCTION

Mr. *X* is on trial in a Montana court charged with sexual intercourse without consent. Mr. *X*'s attorney wishes to introduce evidence concerning the past sexual conduct of his accuser. The state objects and the following dialogue[2] ensues:

> Defense: Your Honor, the state elicited testimony from the complainant showing her lack of sexual experience before the alleged incident. The evidence we want to introduce directly refutes this impression of naivete the state has placed in the jury's mind.
>
> State: Your Honor, Montana's rape-shield statute squarely prohibits the defendant's evidence concerning the victim's past sexual conduct. The statute governs the use of past sexual conduct evidence in all sexual crime cases by generally prohibiting this type of evidence.[3] Although the statute grants two narrow excep-

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* The author wishes to thank Professor Larry M. Elison. Any errors or omissions, however, are strictly the author's alone.

1. Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting SHAKESPEARE, KING RICHARD II, act 1, scene 1).

2. The introductory dialogue is based on the facts of *State v. Calbero*, 71 Haw. 115, 785 P.2d 157 (1989).

3. MONT. CODE ANN. § 45-5-511(4) (1990). The provisions of Montana Code Annotated section 45-5-511(4) are applicable to all sex crimes. The specific rape-shield provisions state:

> (4) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this part except:
>
> (a) evidence of the victim's past sexual conduct with the offender;

tions, neither exception allows past sexual conduct evidence for the purpose to which the defense alludes.

Defense: Your Honor, the sixth amendment to the United States Constitution, however, guarantees the accused the right to confront his accuser, including the right to rigorous cross-examination.

Court: The court sustains the state's objection under Montana Code Annotated section 45-5-511(4) (Montana's Rape-Shield Statute).

The above confrontation between the state and the defense attorney highlights two competing interests: (1) the state's interest in protecting the complainant, and (2) the defendant's right to confront his accuser. Confrontations similar to the above hypothetical have forced courts throughout the country to reexamine the constitutionality of their rape-shield statutes.

This article examines Montana's Rape-Shield Statute to reveal both its inadequacies and its virtues. First, an overview on rape-shield law explains why rape victims need special protection. Second, the article analyzes the structure of Montana's Rape-Shield Statute by comparing it with federal rape-shield law. Next, a survey of Montana case law demonstrates the Montana Supreme Court's application of Montana's Rape-Shield Statute to particular factual scenarios. In addition, an analysis of case law from other jurisdictions, involving constitutional attacks upon their rape-shield statutes, reveals potential problems to avoid in Montana. Finally, the article synthesizes the relative advantages and disadvantages of two general approaches used in the cases from other jurisdictions. This synthesis culminates in a proposed statutory and judicial scheme for Montana courts to use in the future if confronted with attacks on Montana's Rape-Shield Statute.

II. OVERVIEW

Until recently, courts routinely admitted almost all evidence of the complainant's past sexual conduct offered by the defendant in a rape case.[4] Indeed, courts allowed the defense to use evidence

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(b) evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution.

(5) If the defendant proposes for any purpose to offer evidence described in subsection (4)(a) or (4)(b), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (4).

MONT. CODE ANN. § 45-5-511(4), (5) (1989).

4. Tanford & Bocchino, *Rape Victim Shield Laws And The Sixth Amendment*, 128 U.

to impeach the victim's credibility that the state could not use to impeach the defendant's credibility.[5] This judicial attitude resulted from the widespread belief, among a largely male-dominated legal community, that evidence offered in a rape case suggesting the complainant was promiscuous naturally bore on the element of consent and the general credibility of the victim.[6] Judges believed that a woman with an active sexual past would more likely consent to the sexual advances of the defendant. Today, however, the law reflects a changing attitude.[7] Humiliating attacks during a rape trial, using a rape victim's past sexual conduct, serve only to inflame and distract the jury rather than contribute to the overall purpose of the trial, namely, ascertaining facts.[8] Consequently, all but two states developed rape-shield statutes to protect the rape victim by prohibiting harassing questions about her past sexual conduct.[9]

These rape-shield statutes subject evidence involving the complainant's past sexual conduct to a special admissibility test. The evidence must pass the test before judges can admit the evidence at trial. The statutes either generally prohibit past sexual conduct evidence, followed by a list of exceptions,[10] or require the court to balance the probative value of the past sexual conduct evidence against the evidence's prejudicial effect.[11] The more prohibitive the statute, the more susceptible the statute is to constitutional challenges by the defense. Because this article focuses on Montana law in the area of rape-shield protection, it is necessary to analyze both the content of Montana's Rape-Shield Statute and the judicial gloss added by Montana case law to determine the statute's potential for serious constitutional challenges.

PA. L. REV. 544, 546 (1979-80).

5. *Id.* at 549.

6. Berger, *Man's Trial, Woman's Tribulation: Rape Cases In The Courtroom*, 77 COLUM. L. REV. 1, 16 (1977).

7. *Id.* at 10.

8. State v. Williams, 21 Ohio St. 3d 33, 34, 487 N.E.2d 560, 561 (1986).

9. Although Utah and Arizona do not have rape-shield statutes, both states provide protection for the victim by case law. *See* State v. Oliver, 158 Ariz. 22, 760 P.2d 1071 (1988); State v. Suarez, 736 P.2d 1040 (Utah 1987).

10. *See infra* notes 151-58 and accompanying text.

11. *See, e.g.*, ARK. STAT. ANN. § 16-42-101 (1990); CONN. GEN. STAT. § 54-86f (1989); IND. CODE ANN. § 35-37-4-4 (Burns 1990); KY. REV. STAT. ANN. § 510.145 (Baldwin 1988); MD. ANN. CODE art. 27, § 461A (1989); MICH. COMP. LAWS § 750.520j (1990); NEV. REV. STAT. ANN. § 48.069, 48.035 (Michie 1989); N.J. STAT. ANN. § 2A:84A-32.1 (West 1987); N.M. STAT. ANN. § 30-9-16 (1990); VT. STAT. ANN. § 3255 (1989); WYO. STAT. § 6-2-312 (1989).

III. MONTANA'S RAPE-SHIELD STATUTE: THE ORIGINS

In 1975, the legislature amended section 94-5-503 of the Revised Codes of Montana to prohibit evidence of the complainant's past sexual conduct in a sexual intercourse without consent case. In other words, the legislature provided rape-shield protection to the complainant.[12] Before 1985, however, this protection extended only to victims of sexual intercourse without consent.[13] In 1985, Montana extended rape-shield protection to victims of all sexual crimes.[14]

In 1978, the United States Congress passed House Rule of Evidence 412, now Federal Rule of Evidence 412, a strict evidentiary rule that severely limits the instances when federal courts can admit evidence of a rape victim's past sexual conduct.[15] Montana's Rape-Shield Statute is essentially the same as Federal Rule of Evidence 412.[16] Both prohibit evidence of past sexual conduct in the form of reputation or opinion evidence.[17] Both the Montana and federal rules allow evidence of specific acts of past sexual conduct in two limited exceptions: (1) "evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution"[18] and (2) "evidence of the victim's past sexual conduct with the offender."[19]

The federal rule contains an important constitutional safeguard for the defendant not found in Montana's Rape-Shield Statute.[20] In explaining rule 412(b)(1) of the Federal Rules of Evidence, Congressman Mann stated that specific instances of sexual conduct are admitted under the federal rule "where because of an unusual chain of circumstances, the general rule of inadmissibility,

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12. REV. CODES. MONT. § 94-5-503(5)(a)(b) (1975) (redes. MONT. CODE ANN. § 45-5-503(5) (1978)).

13. *See* MONT. CODE ANN. § 45-5-503(5) (1978).

14. *See* MONT. CODE ANN. § 45-5-511(4) (1985).

15. HOUSE R. EVID. 412 (1978); FED. R. EVID. 412. The rule completely bans reputation and opinion evidence in subsection (a). Subsection (b) bans specific instances of past sexual conduct evidence unless: (1) it "is constitutionally required to be admitted; or" (2)(A) it is evidence concerning the "source of semen or injury"; or (2)(B) it is evidence of the victim's "past sexual" conduct "with the accused, offered . . . upon the issue of consent." *Id.*

16. *Compare supra* note 15 *with supra* note 3.

17. FED. R. EVID. 412(a). *See supra* note 3 for the text of Montana Code Annotated section 45-5-511(4)(b) (1990).

18. See *supra* note 3 for the text of Montana Code Annotated section 45-5-511(4)(b) (1990). See also *supra* note 15 for the text of rule 412(B)(2)(A) of the Federal Rules of Evidence.

19. See *supra* note 3 for the text of Montana Code Annotated section 45-5-511(4)(a) (1990). See also *supra* note 15 for the text of rule 412(b)(2)(B) of the Federal Rules of Evidence.

20. See *supra* note 15 for the text of rule 412(b)(1) of the Federal Rules of Evidence.

if followed would result in denying the defendant a constitutional right."[21] The absence of this allowance in Montana's Rape-Shield Statute, coupled with the statute's unequivocal ban on reputation and opinion evidence, makes Montana's Rape-Shield Statute one of the nation's most prohibitive.

IV. MONTANA CASE LAW: NO SERIOUS CHALLENGES

In the 1980s, the Montana Supreme Court reviewed several cases specifically raising the issue of admissibility of past sexual conduct evidence. In *State v. Higley*,[22] the defendant was convicted of raping a woman in Bozeman.[23] During the defendant's trial, the defendant wished to introduce testimony from the victim's landlady concerning a conversation the landlady overheard between the complainant and her roommate. According to the landlady, the victim allegedly laughed when her roommate commented to her, "Where are all of Bozeman's rapists? Linnie needs to be raped again."[24] The defense also wanted to cross-examine the victim concerning a suggestive logo inscribed on the victim's jacket at the time of the alleged incident.[25]

The trial court granted the state's motion in limine, which excluded both the landlady's testimony and the defendant's desired line of cross-examination.[26] On appeal, the defendant raised a sixth amendment defense arguing that his right to confrontation included the right to cross-examine and introduce relevant evidence necessary for his defense.[27]

The Montana Supreme Court unanimously affirmed the lower court, reasoning that "[t]he Sixth Amendment guarantees a criminal the right to testimony of witnesses in his favor. However, it does not guarantee him the right to any and all witnesses, regardless of their competency or knowledge."[28] Following the guidelines established in *Chambers v. Mississippi*,[29] the Montana Supreme Court found the prohibitions contained in section 45-5-503(5) of the Montana Code Annotated and rule 608(b) of the Montana Rules of Evidence represented a legitimate state interest "to pre-

21. State v. Clarke, 343 N.W.2d 158, 162 (Iowa 1984) (quoting 124 CONG. REC. H11,944 (1978) (statement of Congressman Mann)).
22. 190 Mont. 412, 621 P.2d 1043 (1980).
23. *Id.* at 415-16, 621 P.2d at 1046-47.
24. *Id.* at 423, 621 P.2d at 1050.
25. *Id.* The jacket logo read: "Liquor in the front, and poker in the back." *Id.*
26. *Id.*
27. *Id.* at 422, 621 P.2d at 1050.
28. *Id.* at 423, 621 P.2d at 1050 (citation omitted).
29. 410 U.S. 284, 295 (1972).

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serve the integrity of the trial and to prevent it from becoming a trial of the victim."[30] These restrictions, according to the court, did not arbitrarily infringe upon the defendant's right to present his defense.[31] Additionally, the court reasoned that testimony concerning the victim's sexual views is admissible under Rule 405(b) of the Montana Rules of Evidence *only when her " 'character is in issue' " and " 'central to the outcome of the case.' "*[32]

Higley exemplifies the necessity of rape-shield protection. The landlady's testimony and the defense's questions about the victim's jacket, although possibly indicating the victim's general views on sexual matters, did not indicate whether the victim consented to the particular sexual advances of the defendant at the time of the alleged rape. However, the court's resolution of the constitutional issue concerning the defendant's right to cross-examine the complainant deserved a much more careful analysis. The United States Supreme Court has cast a suspicious eye on state evidentiary rules that infringe upon the defendant's right to confrontation.[33]

Two years later, in *State v. Lamb*,[34] the lower court granted the state's motion in limine, thereby prohibiting the defense from introducing evidence that the complainant's accusations were "motivated by a psychological syndrome resulting from a previous sexual assault."[35] Without detailing what the offered evidence entailed, the Montana Supreme Court affirmed the lower court's ruling, relying on *Higley*'s policies and rationale.[36] The *Lamb* court noted that the offered evidence "neither controls the outcome of the case . . . nor falls within the exceptions of 45-5-503(5)."[37] Because "there was overwhelming evidence supporting the victim's

30. *Higley*, 190 Mont. at 424, 621 P.2d at 1050-51. Rule 608(b) of the Montana Rules of Evidence states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of the truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .

MONT. R. EVID. 608(b). *Higley*, a 1980 Montana case, was governed by Montana Code Annotated section 45-5-503(5) and rule 608(b) of the Montana Rules of Evidence. *See supra* note 13 and accompanying text.

31. *Higley*, 190 Mont. at 424, 621 P.2d at 1050-51.

32. *Id.* at 424, 621 P.2d at 1051 (quoting the Commission Comments on rule 405(b) of the Montana Rules of Evidence) (emphasis added).

33. *See infra* section V.

34. 198 Mont. 323, 646 P.2d 516 (1982).

35. *Id.* at 326, 646 P.2d at 518.

36. *Id.* at 327-28, 646 P.2d at 518-19. *See* text accompanying *supra* notes 28 and 30.

37. *Lamb*, 198 Mont. at 328, 646 P.2d at 519 (emphasis added).

claim," evidence of her past sexual conduct, according to the court, was inadmissible.[38]

The implied test that emerges from *Lamb* places a dangerous gloss on Montana's Rape-Shield Statute. The trial court may admit past sexual conduct evidence that would "control the outcome of the case."[39] However, in a rape case the victim's character is not in issue unless the state raises the issue of the victim's character. If the state does not raise the issue of the victim's character then the past sexual conduct evidence would not "control the outcome of the case" and the court should not admit the evidence. Nevertheless, if the court does not use this analysis, the broad language of the *Lamb* test, "control the outcome of the case," may provide a dangerously broad exception to the statute that future defense counsel could use to admit past sexual conduct evidence.

The next attack on Montana's rape shield law occurred in *State v. Anderson*,[40] where the defendant was convicted of sexual assault in the lower court.[41] On appeal, the defendant argued that the court should have admitted evidence concerning a prior sexual assault charge made by the complainant against a different defendant.[42] To attack the complainant's credibility the defendant offered evidence to show that the prosecution had dropped the prior sexual assault charge before trial.[43] The defendant argued that the prosecution's dismissal of the prior sexual assault charge was sufficient to prove that the prior charge was falsely made by the complainant.[44] Hence, the defendant in *Anderson* was claiming that the sexual assault charge made by the complainant against him was false, and that the evidence concerning the prosecution's dismissal was admissible despite rule 608(b) of the Montana Rules of Evidence and Montana's Rape-Shield Statute.[45]

The *Anderson* court reasoned that a court must not only find that the prior claim was already adjudicated to be false,[46] but must also find that the prior claim evidence was *only* offered to prove the narrow "issue of the complaining witness' veracity."[47] The court refused to admit the defendant's proposed evidence because

38. *Id.*
39. *Id.* (emphasis added).
40. 211 Mont. 272, 686 P.2d 193 (1984).
41. *Id.* at 276, 686 P.2d at 193.
42. *Id.* at 281-82, 686 P.2d at 198-99.
43. *Id.* at 281, 686 P.2d at 198.
44. *Id.*
45. *Id.* at 282-83, 686 P.2d at 199-200.
46. *Id.* at 284, 686 P.2d at 200.
47. *Id.* (citing Hall v. State, 176 Ind. App. 59, 374 N.E.2d 62 (1978)).

it failed to meet these two requirements.

The *Anderson* court's reasoning also placed a gloss upon Montana's Rape-Shield Statute. The court affirmed the conviction, but clearly stated that "limiting or barring a defendant's cross-examination of a complaining witness in a sex crime case where there is evidence of prior false accusations restricts the defendant's enjoyment of the worth of his constitutional right to confront witnesses."[48]

In another Montana case, *State v. Fitzgerald*,[49] the defendant was convicted of four counts of sexual intercourse without consent.[50] At trial, the defendant attempted to elicit testimony from the complainant on cross-examination that the victim's friend was a prostitute.[51] Ultimately, the defendant wanted to show that the victim was also a prostitute and had fabricated the rape charges against the defendant to escape punishment from her pimp.[52] Pursuant to Montana's Rape-Shield Statute, the lower court prohibited this line of questioning.[53]

On appeal, the defendant raised a two-pronged attack on Montana's Rape-Shield Statute. The defendant first argued that, because he offered the evidence *only* for the narrow issue of the witness' veracity, the evidence was admissible under *Anderson*.[54] The defendant next argued that Montana's Rape-Shield Statute violated his right of confrontation by unreasonably limiting his opportunity to cross-examine adverse witnesses.[55]

The *Fitzgerald* court used a balancing test finding that the prejudicial effect of the evidence outweighed its probative value. Thus, the evidence was properly rejected by the lower court despite *Anderson*.[56] The court's reluctance to apply Montana's Rape-Shield Statute was dangerous because the statute contains explicit restrictions on past sexual conduct evidence, while the use of this balancing test leaves the answer to the admissibility question entirely up to the court's best judgment.[57] The court also rejected the defendant's confrontation argument, affirming *Higley's* policies

48. *Id.* (citing Hughes v. Raines, 641 F.2d 790, 792 (9th Cir. 1981)).

49. 238 Mont. 261, 776 P.2d 1222 (1989).

50. *Id.* at 262, 776 P.2d at 1223.

51. *Id.* at 263, 776 P.2d at 1223.

52. *Id.*

53. *Id.*

54. *Id.* at 263, 776 P.2d at 1224.

55. *Id.* at 263, 776 P.2d at 1223. The defendant in *Fitzgerald* used an argument similar to the defendant's argument in *Higley*. *See supra* note 27 and accompanying text.

56. *Fitzgerald*, 238 Mont. at 264, 776 P.2d at 1224.

57. *Compare supra* note 3 *with supra* note 11 and accompanying text.

juveniles and rape victims can suffer if the victims are exploited by the defense's use of irrelevant evidence during a trial. Both statutes contemplate a crafty defense counsel who attempts to characterize the defendant as a victim and the victim as a defendant. Both statutes seek to prevent it. Despite these valid considerations, the *Davis* court implicitly recognized a countervailing fundamental right deeply rooted in the constitution. A defendant on trial risks losing his liberty. It is vital to give the accused a fair trial—a trial that allows the defendant to present a largely uninhibited defense. The *Davis* court stated, "whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—*if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.*"[81] The defendant's right to confront adverse witnesses, held to be paramount in *Chambers* and *Davis*, provided a basis for attacking the constitutionality of rape-shield statutes.

VI. Rape-Shield Statutes Under Assault: The Reaction Montana Must Avoid

A survey of attacks on federal and state rape-shield statutes, based on the defendant's right of confrontation demonstrates the applicability of *Davis* and *Chambers* to rape-shield laws.[82] Shortly after *Davis*, and before the advent of the federal rape-shield statute in 1978, Oregon faced an attack on its rape-shield statute by a defendant convicted of attempting to rape a ten-year-old girl.[83] At trial, the defendant attempted to introduce evidence indicating that the complainant falsely accused him.[84] The defendant alleged that the complainant's motive for bringing the charge stemmed from her fear that the defendant would tell her parents of her alleged sexual activity with a thirteen-year-old boy and her uncle.[85] Pursuant to Oregon's rape-shield statute, the lower court prohibited the use of this evidence.[86]

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81. *Davis*, 415 U.S. at 319 (emphasis added).

82. Although the defendants in *Davis* and *Chambers* were not accused of rape, the reasoning used by both courts is applicable to rape-shield law. These two United States Supreme Court cases examine the legitimacy of state evidentiary rules in opposition to the defendant's right to confrontation. *See supra* notes 65-66, 78 and accompanying text.

83. State v. Jalo, 27 Or. App. 845, 847, 557 P.2d 1359, 1360 (1976).

84. *Id.* at 849, 557 P.2d at 1361.

85. *Id.* at 847, 557 P.2d at 1360.

86. *Id.* Oregon Revised Statute section 163.475(3) (1976) provided that "evidence of previous sexual conduct of a complainant shall not be admitted and reference to that conduct shall not be made in the presence of the jury." See *infra* note 90 for the text of Ore-

On review, the Oregon Court of Appeals considered whether the state's interest in protecting a rape victim infringed upon the defendant's constitutional right of confrontation.[87] The appeals court held that Oregon's rape-shield statute "infringes upon the defendant's constitutional right to confrontation as here applied to prohibit evidence of the complainant's ulterior motive for making a false charge."[88] Without distinguishing between the state interest at issue in *Davis*, and the state interest in protecting a rape victim, the appeals court asserted that "on the facts at bar, however, this policy must likewise be subordinated to the defendant's constitutional right to confrontation."[89] The *Jalo* court's rejection of Oregon's rape-shield statute demonstrates the impact of *Davis* and *Chambers* on rape-shield law. After *Jalo*, Oregon's statute now allows past sexual conduct evidence not only to show witness bias, but also if it is "otherwise constitutionally required to be admitted."[90]

Rule 412 of the Federal Rules of Evidence did *not* solve this constitutional dilemma at the federal level. The United States Court of Appeals in *United States v. Nez*[91] noted that although little case law had emerged concerning rule 412 of the Federal Rules of Evidence, similar state provisions have come under attack recently.[92] In *Nez*, the lower court applied federal rule 412(b) to prohibit the defendant from introducing evidence of the victim's past sexual conduct to show witness bias.[93]

Although the court in *Nez* affirmed the defendant's conviction, the court indicated that under *Davis* the use of evidence of specific instances of past sexual conduct is admissible to examine the motive or bias of a witness in a rape proceeding if properly offered under federal rule 412(b)(1).[94] However, the court failed to explore the ultimate issue, that is, what does "constitutionally required to be admitted" mean.[95] The court stated that evidence of past sexual conduct to show motive or bias "is always a proper subject for ex-

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gon's current statute.

87. *Jalo*, 27 Or. App. at 850, 557 P.2d at 1362.

88. *Id.* (quoting Davis v. Alaska, 415 U.S. 308, 317 (1974)).

89. *Id.* at 851, 557 P.2d at 1362.

90. OR. REV. STAT. § 412 (1989). Rule 412(2)(b)(a) allows specific instances of past sexual conduct "if it relates to the motive or bias of the alleged victim." Rule 412(b)(1) allows the same type of evidence if it is "otherwise constitutionally required to be admitted."

91. 661 F.2d 1203 (10th Cir. 1981).

92. *Id.* at 1205.

93. *Id.* at 1204.

94. *Id.* at 1206.

95. See *supra* note 15 for the text of rule 412(b)(1) of the Federal Rules of Evidence.

amination."[96] The *Nez* court's failure to further define the *constitutionally required to be admitted* language opened the door for future defendants to expand the *Chambers* and *Davis* decisions.

Inevitably, defendants attempted to stretch the *Chambers* and *Davis* holdings to allow defendants to use past sexual conduct evidence for purposes other than showing a witness' motive or bias. In *State v. Calbero*,[97] a recent Hawaii case, the defendant was convicted of sexual assault in a lower court.[98] On appeal, the defendant raised a two-pronged attack on Hawaii's rape-shield statute, a statute that is similar to Montana's.[99]

At trial, the defendant wished to cross-examine the complainant concerning statements she made as a witness about her sexual past, and statements she made to the defendant during the alleged sexual assault.[100] The defendant contended that on direct-examination, when the complainant indicated that "she never consented to having sex with men, she negated the defendant's consent defense."[101] The defendant argued that he could refute her statements using evidence of her past sexual conduct. Additionally, the defendant argued that any statements made by the complainant to the defendant during the alleged incident, were admissible to show the defendant's state of mind at the time of the alleged assault.[102]

The defendant's second alleged error dealt with the lower court's application of Hawaii's rape-shield statute.[103] The court cited *Doe v. United States*,[104] which interpreted federal rule 412 as not prohibiting the use of the victim's conversation with the defendant to show the defendant's state of mind at the time of the incident.[105] According to the Hawaii Supreme Court in *Calbero*, "if the issue is consent, the complaining witness' statements as to her past sexual experience to the defendant are relevant and should have been allowed under the statute."[106]

In *Calbero*, the first prong of the defendant's attack presented a clear conflict between Hawaii's rape-shield statute and the de-

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96. *Nez*, 661 F.2d at 1206.
97. 71 Haw. 115, 785 P.2d 157 (1989).
98. *Id.* at 116, 785 P.2d at 157.
99. *Id.* at 124, 785 P.2d at 161; HAW. R. EVID. § 412 (1989). Rule 412 of the Hawaii Rules of Evidence is identical to federal rule 412. *See supra* note 15. *Compare supra* note 15 *with supra* note 3.
100. *Calbero*, 71 Haw. at 124, 785 P.2d at 161.
101. *Id.*
102. *Id.* at 125, 785 P.2d at 161.
103. *Id.*
104. 666 F.2d 43 (4th Cir. 1981).
105. *Id.* at 48.
106. *Calbero*, 71 Haw. at 127, 785 P.2d at 162.

fendant's right to confrontation. The lower court had severely limited the defendant's ability to cross-examine the complainant's testimony that indicated her lack of prior sexual experience.[107] The Hawaii Supreme Court held that because the rape-shield statute prevented the defendant from cross-examining the complainant, it violated the defendant's right of confrontation.[108]

The *Calbero* court used *Government of Virgin Islands v. Jacobs*,[109] to reach its decision on the defendant's first attack on Hawaii's rape-shield statute. The *Jacobs* court discussed the constitutional attacks on state rape-shield statutes and rule 412 of the Federal Rules of Evidence, following *Chambers* and *Davis*.[110] In both *Calbero* and *Jacobs*, the prosecution elicited information from the complainant about her past sexual conduct to bolster its own case.[111] The issue that confronted both courts was whether the prosecution, having opened the door for the defense to use past sexual conduct evidence, could close it on the defense by invoking the rape-shield statute.[112]

The *Jacobs* court held that rule 412(b)'s constitutional exception allows the defendant to impeach the complainant with prior sexual conduct evidence when the prosecution first opens the door.[113] The court was influenced by the *Davis* holding in reaching this decision.[114] Similarly, the court in *Calbero* held that the defendant's confrontation right mandated a favorable ruling for the defendant.[115] The *Calbero* court also held that the rape-shield statute, as applied by the lower court to prevent the defendant from questioning the complainant about her past sexual conduct once the state opened the door, was unconstitutional.[116]

Many state statutes specifically allow the defendant to use past sexual conduct evidence if the state first opens the door by

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107. *Id.* at 119, 785 P.2d at 158-59.

108. *Id.* at 127, 785 P.2d at 161.

109. 634 F. Supp. 933 (D.V.I. 1986) (*Jacobs* is a federal case in which the court confronted issues similar to those confronted by the *Calbero* court in interpreting federal rule 412.).

110. *Id.* at 938-39.

111. *Id.* at 935. *See also supra* note 101 and accompanying text.

112. *Jacobs*, 634 F. Supp. at 935.

113. *Id.* at 940.

114. The *Jacobs* court noted an important factor present in *Davis*. The defendant was prohibited from cross-examining a crucial state's witness; a witness that the prosecution relied on to prove its case against the defendant. *Id.* at 938. Therefore, the *Jacobs* court stated that "the concern of the *Davis* court exists in every rape case where the alleged victim is the prosecution's key witness. Her credibility is crucial to the issue of whether the rape occurred." *Id.*

115. *Calbero*, 71 Haw. at 124, 785 P.2d at 162.

116. *Id.*

using past sexual conduct evidence to support its own case.[117] Other state and federal courts have carved out this exception to their rape-shield statutes in case law.[118] Courts have also faced situations in which the defense intends to use past sexual conduct evidence to establish the defense of consent, even though the prosecution has *not* opened the door. The following case exemplifies such a situation and indicates the views of the newest United States Supreme Court Justice.

In *State v. Colbath*,[119] the defendant wished to introduce evidence that showed that on the day of the alleged rape, the complainant engaged in publicly suggestive acts with a group of men that included the defendant.[120] The defendant argued that this conduct showed the complainant expressed her consent to sexual activity with the defendant.[121] The lower court prohibited the defendant from introducing this evidence pursuant to New Hampshire's rape-shield statute.[122] New Hampshire's rape-shield statute bars all evidence of "prior consensual sexual activity between the victim and any other person other than the defendant."[123] The jury subsequently convicted the defendant of aggravated felonious assault.[124]

Justice Souter wrote the majority opinion for the New Hampshire Supreme Court that reversed the lower court's evidentiary ruling, creating a new exception to New Hampshire's rape-shield statute that accommodated the defendant's constitutional right of confrontation.[125] Justice Souter noted that "despite the statute's absolute terms" its application is limited by the defendant's right

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117. MD. ANN. CODE art. 27, § 461A (1990); N.Y. CRIM. PROC. LAW § 60.42 (Consol. 1990); N.D. CENT. CODE § 12.1-20-14(2) (1989); OKLA. STAT. tit. 22, § 750 (1989); VA. CODE ANN. § 18.2-67.7 (1990); WASH. REV. CODE ANN. § 9A.44.020(4) (1990); W. VA. CODE § 61-8B-11(b) (1989).

118. State *ex rel.* Pope v. Superior Court, 113 Ariz. 22, 29, 545 P.2d 946, 953 (1976); Commonwealth v. McKay, 363 Mass. 220, 294 N.E.2d 213 (1973); State v. Williams, 21 Ohio St. 3d 33, 487 N.E.2d 560 (1986); State v. Camara, 113 Wash. 2d 631, 781 P.2d 483 (1989). *But see* Johnson v. State, 146 Ga. App. 277, 246 S.E.2d 363 (1978); State v. Sandoval, 135 Ill. 2d 159, 552 N.E.2d 726, *cert. denied*, 111 S. Ct. 343 (1990).

119. 130 N.H. 316, 540 A.2d 1212 (1988) (Souter, J.).

120. *Id.* at 317, 540 A.2d at 1213.

121. *Id.*

122. *Id.* at 321, 540 A.2d at 1215; N.H. REV. STAT. ANN. § 632-A:6 (1988).

123. *Colbath*, 130 N.H. at 321, 540 A.2d at 1215. The statute remains unchanged and states: "prior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in any prosecution under this chapter." N.H. REV. STAT. ANN. § 632-A:6 (1989).

124. *Colbath*, 130 N.H. at 317, 540 A.2d at 1212.

125. *Id.* at 325, 540 A.2d at 1217. The new exception to New Hampshire's rape-shield statute allows evidence of the complainant's publicly suggestive acts, close in time to the alleged incident, to the defendant or a group to which the defendant belongs. *Id.*

of confrontation.[126] To facilitate this process, according to Justice Souter, the court should use a balancing test that allows the defendant to introduce evidence facially prohibited by the rape-shield statute "*if the defendant demonstrates that the probative value of the evidence outweighs its prejudicial effect on the prosecutrix.*"[127]

In applying this test to *Colbath*, Justice Souter drew an interesting distinction between the private behavior of the prosecutrix and her public acts.[128] Essentially, Justice Souter argued that evidence of the victim's publicly suggestive acts was less likely to cause prejudice to the complainant than evidence concerning her private acts. Justice Souter added a corollary to this distinction stating that "*evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners.*"[129] In other words, what a complainant does in the public view is more probative than prejudicial and, therefore, is more likely admissible than evidence of private acts. What a complainant does in private, with partners she freely chooses, fails the same balancing test and is less likely to be admitted.

Justice Souter attempted in *Colbath* to qualify the rather broad exception the decision created.[130] First he noted that the facts of *Colbath* made the evidence offered by the defense particularly probative to the consent defense. The defendant's girlfriend allegedly interrupted the defendant and complainant and engaged the complainant in a violent fit of jealousy.[131] Therefore, as Justice Souter's opinion stated, "with a motive for the complainant to make a false accusation, the outcome of the prosecution could well have turned on a very close judgment about the complainant's attitude of resistance or consent."[132] Arguably though, the importance Justice Souter attached to the fact that the complainant may have had a motive to bring the claim against the defendant expands

126. *Id.* at 323, 540 A.2d at 1216.

127. *Id.* (citing State v. Howard, 121 N.H. 53, 59, 426 A.2d 457, 461 (1981)) (emphasis added). See *supra* note 57 and accompanying text for a discussion of *State v. Fitzgerald*, 238 Mont. 261, 776 P.2d 1222 (1989). Note the interesting parallels in the reasoning of Justice Souter and the Montana Supreme Court. This probative value versus prejudicial effect balancing test appears nowhere in the clear language of the New Hampshire and Montana rape-shield statutes.

128. *Colbath*, 130 N.H. at 323, 540 A.2d at 1216.

129. *Id.* (emphasis added).

130. *Id.*

131. *Id.*

132. *Id.*

and rationale.[58] The *Fitzgerald* court found it unnecessary to weigh the interest of the state in protecting the victim against the defendant's right of confrontation. If the defendant's right to confrontation and the state's interest in protecting the victim at a rape trial clash in the future, it is not clear what course the Montana Supreme Court will follow. By examining the struggles experienced by other jurisdictions in the rape-shield area, however, Montana can maintain the strictest rape-shield protection, while still providing the defendant with a fair trial.

V. THE SIXTH AMENDMENT STRATEGY: THE *DAVIS* AND *CHAMBERS* DILEMMA

The United States Supreme Court has examined the conflict between a state's criminal evidentiary rule and the defendant's constitutional right of confrontation.[59] Defense attorneys consistently use *Chambers v. Mississippi*[60] and *Davis v. Alaska*[61] when attacking the constitutionality of rape-shield laws.[62] In *Chambers*,[63] the defendant, convicted of murder in the lower court, challenged Mississippi's voucher rule[64] alleging it prevented him from effectively cross-examining a state's witness.[65] The defendant also attacked Mississippi's hearsay rule, which the defendant alleged prevented him from calling witnesses potentially damaging to the state's case.[66] The United States Supreme Court reversed the defendant's conviction, holding that "the State's refusal to permit [the defendant] to cross-examine [the state's witness], denied him a trial in accord with traditional and fundamental standards of due process."[67]

However, the Court's decision in *Chambers* did not absolutely preclude a state from establishing evidentiary rules in opposition

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58. *Fitzgerald*, 238 Mont. at 264, 776 P.2d at 1224. *See* text accompanying *supra* notes 28 and 30.

59. However, the United States Supreme Court has never examined the constitutionality of a state or federal rape-shield statute. *See* State v. Sandoval, 135 Ill. 2d 159, 552 N.E.2d 726, *cert. denied*, 111 S. Ct. 343 (1990).

60. 410 U.S. 284 (1973).

61. 415 U.S. 308 (1974).

62. Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1248 (1989).

63. 410 U.S. at 284.

64. *Id.* at 294. The voucher rule "require[s] a party to vouch for the credibility of witnesses he brought before the jury to affirm his veracity. Having selected them especially for that purpose, the party might reasonably be expected to stand firmly behind their testimony." *Id.* at 296.

65. *Id.* at 294.

66. *Id.*

67. *Id.* at 302.

to the defendant's right to confrontation.[68] The Court stated that "the right to confront and to cross-examine is not absolute and *may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.*"[69] Therefore, courts must "closely examine" whether the state's interest in shielding the rape victim in a rape trial is a legitimate interest under the *Chambers* rationale.[70]

Another United States Supreme Court case, *Davis v. Alaska*,[71] involved a state interest *similar* to the state interest underlying rape-shield statutes.[72] In *Davis*, the defendant, on trial for burglary and grand larceny, wished to cross-examine a key state witness to show the witness had a motive or bias in testifying against the defendant.[73] To do this, the defense needed to use information contained in the witness's juvenile record.[74] The record revealed that the witness was on probation for burglary when the witness provided information to the police implicating the defendant.[75] The lower court prohibited the defendant from disclosing the witness's juvenile record.[76] An Alaska statute protects juvenile delinquents by prohibiting the use of juvenile records in a criminal trial.[77]

In reviewing the case, the United States Supreme Court weighed the state's interest in keeping juvenile records confidential against the defendant's right to effectively cross-examine the state's witness.[78] The Court overturned the lower court's ruling, holding that "in this setting we conclude that the right of confrontation is paramount to the state's policy of protecting a juvenile offender."[79]

The policies underlying the state's interest in protecting a juvenile at trial are *similar* to those that seek to protect a rape victim at trial.[80] Statutes that protect juveniles and statutes that protect rape victims anticipate the unnecessary humiliation that

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68. *Id.* at 302-03.
69. *Id.* at 295 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972)) (emphasis added).
70. *Id.*
71. 415 U.S. 308 (1974).
72. *Id.* at 319.
73. *Id.* at 311.
74. *Id.* at 310.
75. *Id.*
76. *Id.* at 312-13.
77. *Id.* at 310-11.
78. *Id.* at 319.
79. *Id.*
80. *See* Commonwealth v. Black, 337 Pa. Super. 548, 487 A.2d 396 (1985). The *Black* court stated: "we find the juvenile statutes in *Davis* and the Rape Shield Law in this case strikingly similar." *Id.* at 557, 487 A.2d at 400.

rather than narrows the publicly suggestive acts exception created in *Colbath*. The complainant's alleged motive arose from a private incident and was thus unrelated to her alleged suggestive acts. Because Justice Souter emphasized the complainant's alleged motive to bring a false charge against the defendant, Justice Souter may have actually created a second exception to New Hampshire's rape-shield statute that allows past sexual conduct to show the complainant had a motive to bring a false charge against the defendant.

The closeness in time between the alleged rape incident and the complainant's alleged suggestive acts was also important to Justice Souter. He stated that "evidence that the publicly inviting acts occurred closely in time to the alleged sexual assault by one such man could have been viewed as indicating the complainant's likely attitude at the time of the sexual activity in question."[133] However, the fact that the complainant's suggestive acts occurred near the time of the alleged rape proves little about her attitude toward the defendant's unsolicited sexual advances during *the only relevant time, that is, when the alleged rape occurred.* Furthermore, the complainant's alleged suggestive acts were made to a group that *included* the defendant, and not to the defendant *himself.*

Justice Souter's decision merits comment, particularly in light of the similarity between the New Hampshire rape-shield statute and Montana's.[134] New Hampshire's rape-shield statute, similar to Montana's rape-shield statute, contains no provision for the defendant's right to confrontation. Instead, both statutes ban all evidence of a complainant's past sexual conduct with a few narrow exceptions, leaving no discretion to the court. To comply with *Davis* and *Chambers*, courts are tempted to and do create piecemeal exceptions to prohibitive rape-shield statutes that consider the defendants' constitutional rights despite the statutes' "absolute terms."[135] The *Colbath* decision illustrates that a judicially conceived exception to a rape-shield statute can be so broad that a court can transform an unduly prohibitive rape-shield statute into an unduly permissive one.

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133. *Id.*

134. *Compare supra* note 3 *with supra* note 123.

135. *Colbath*, 130 N.H. at 323, 540 A.2d at 1216.

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VII. A SYNTHESIS OF JUDICIAL APPROACHES IN APPLYING RAPE-SHIELD STATUTES

The state and federal cases previously discussed employ two general approaches. Combining these two general approaches with Montana's current rape-shield statute will help prevent piecemeal unraveling of Montana's statute. The first approach allows the court to elevate the state's interest in protecting a rape victim to a level that overrides the defendant's constitutional right of confrontation in all circumstances except those enumerated in the statute. A court following this approach would simply apply the rape-shield statute more mechanically than those courts surveyed in the previous section.

The second approach is to construct statutes containing elaborate exceptions to general bans on past sexual conduct evidence.[136] Such statutes would be designed to solve all possible problems caused by using evidence of a rape victim's past sexual conduct.[137] This approach allows the court to use more discretion than the first approach, but still requires the court to fit offered evidence into a statute's cubbyholes of exceptions.

The advantages of the first approach are immediately apparent. A court that seeks to severely restrict the admissibility of past sexual conduct evidence can rely on the legislative mandate in the rape-shield statute. By doing so, the court avoids carving out exceptions on a case-by-case basis as exemplified by the New Hampshire Supreme Court in *Colbath*.[138] In rejecting the defendant's constitutional attacks, courts using the first approach could argue that rape-shield statutes separate rape proceedings from other criminal proceedings. In support of this argument, the court could state that the legislature has determined that statutes providing special evidentiary rules in a rape case are necessary for a variety of policy reasons, and that the court must mechanically apply the statute to comply with this legislative intent.

The special evidentiary rules provided by a rape-shield statute will conflict with traditional rules of evidence because they may prohibit the defendant from introducing certain types of evidence otherwise admissible. A court that creates exceptions not provided by the statute to accommodate the defendant's right to confrontation is attempting to make the rape-shield statute compatible with other rules of evidence in derogation of the legislature's intent.

136. *See infra* notes 151-58 and accompanying text.
137. *Id.*
138. *See supra* note 125 and accompanying text.

The fundamental policy underlying rape-shield protection is that a rape victim needs protection beyond that afforded by traditional rules of evidence and, consequently, the rape-shield statute must provide special evidentiary rules. To successfully implement the first approach, a court must justify the state's interest in protecting the victim as a legitimate limitation on the defendant's right to confrontation. Following this approach, one state court using the *Chambers* test,[139] stated that "the defendant's right to confront and cross-examine witnesses concerning the victim's past sexual behavior with others must bow to accommodate the state's interest in the Rape-Shield Statute."[140] In *Harris v. State*, the Georgia Supreme Court noted the special policies underlying rape-shield statutes, and the particular potential for abuse that past sexual conduct evidence presents in a rape trial.[141]

One underlying policy that distinguishes the state's interest expounded by rape-shield statutes from other state interests is the history of judicial and societal prejudice against rape victims. Before rape-shield laws, courts routinely allowed evidence of the complainant's sexual past.[142] Courts allowed defense counsel to attack the complainant's character by painting a picture of promiscuity for the jury, even though this picture did not contribute to the issue of the guilt or innocence of the accused.[143]

The societal impact of this judicial prejudice was to discourage rape victims from reporting their attacks.[144] Quite understandably, today, women are reluctant to report and prosecute a sex crime if the potential for humiliation exists.[145] Therefore, mindful of the intense atmosphere of a rape trial and the tendency for past sexual conduct evidence to inflame and distract a jury, individual states created rape-shield protection.[146] In passing rape-shield statutes, the states wanted to encourage women to report and prosecute what may be the most under-reported crime of our day.[147]

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139. Chambers v. Mississippi, 410 U.S. 284, 302 (1972). The *Chambers* test analyzes whether prohibiting the defendant from using certain types of evidence "would deny him a fair trial in accord with traditional and fundamental standards of due process." *Id.* *See supra* note 67 and accompanying text.

140. Harris v. State, 257 Ga. 666, 669, 362 S.E.2d 211, 213 (1987).

141. *Id.*

142. Tanford & Bocchino, *supra* note 4, at 549.

143. *Harris*, 257 Ga. at 669, 362 S.E.2d at 213.

144. Berger, *supra* note 6, at 5.

145. Of course, the emotional trauma experienced by a rape victim may be so strong that even with the protection afforded by rape-shield statutes, the victim may be unable, emotionally, to prosecute the rape crime.

146. *Harris*, 257 Ga. at 669, 362 S.E.2d at 213.

147. *Id.* "Rape is a grossly under-reported crime. A woman is raped in this country

Several problems, however, threaten the vitality of an approach that creates an overriding state interest in protecting the victim. First, the cases explored above demonstrate that the defendant's right of confrontation is a powerful one. The United States Supreme Court may overturn a rape-shield statute applied mechanically even if the defendant's right to confrontation is only *somewhat* infringed.[148] Thus, the policies underlying rape-shield statutes are actually threatened by such an approach. The danger with combining a prohibitive statute with a mechanistic application by the court is that if overturned, the court or the legislature may create an unduly permissive system of rape-shield protection to prevent further constitutional attacks.[149] Second, the legislature, by constructing such a prohibitive statute, may find that the court, like the New Hampshire court in *Colbath*, will create more exceptions to the particular rape-shield statute on a case-by-case basis to accommodate the defendant's constitutional right of confrontation.[150]

Some states structure their rape-shield statutes to provide their courts the means to solve this problem. These states exemplify the second approach. A statute containing an array of exceptions allows the higher state courts to reverse the lower courts' application of the statute, rather than labeling the statute as unconstitutional.[151] One example of such a statute is the Kansas rape-shield statute that permits the defense to use evidence of the victim's past sexual conduct that is "relevant to any fact at issue, such as the identity of the rapist, consent of the victim, and whether the defendant actually had intercourse with the victim."[152]

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every three minutes, yet only ten percent of the rapes are reported." *Rape and Stereotypes*, Boston Globe, July 27, 1990 at 10p.

148. Berger, *supra* note 6, at 53.

149. *See supra* notes 90 and 125 and accompanying text.

150. *See supra* note 125.

151. Phillips v. State, 545 So. 2d 221 (Ala. Crim. App. 1989); Daniels v. Alaska, 767 P.2d 1163 (Alaska Ct. App. 1989); Baeza v. State, 489 So. 2d 36 (Fla. Dist. Ct. App. 1986); Smith v. State, 259 Ga. 135, 377 S.E.2d 158 (1989); State v. Bressman, 236 Kan. 296, 689 P.2d 901 (1984); State v. Ray, 637 S.W.2d 708 (Mo. 1982)(en banc); State v. Wattenbarger, 97 Or. App. 414, 776 P.2d 1292 (1989); State v. Oliveira, 576 A.2d 111 (R.I. 1990); State v. Finley, 300 S.C. 196, 387 S.E.2d 88 (1989).

152. To be admissible under this type of exception, the following state rape-shield statutes also require that the probative value of the evidence outweighs its potential for prejudice: IND. CODE ANN. § 35-37-4-4 (Burns 1990); KAN. STAT. ANN. § 21-3525 (1988); KY. REV. STAT. ANN. § 510.145 (Baldwin 1990); MD. ANN. CODE art. 27, § 461A (1990); MICH. COMP. LAWS § 750.520j (1990); N.M. STAT. ANN. § 30-9-16 (1990); VT. STAT. ANN. tit. 1, § 3255 (1989). Missouri's rape-shield statute admits the evidence under this exception without the additional requirement that the probative value of the evidence outweighs its potential for prejudice. MO. REV. STAT. § 491.015 (1989).

Missouri's rape-shield statute allows the same evidence if it is "evidence of immediate surrounding circumstances of the alleged crime, or if the court finds the evidence relevant to a material fact or issue."[153] Some other exceptions states have formulated include: (1) "evidence of past sexual conduct to impeach the witness credibility",[154] (2) evidence used to show an unusual pattern of consensual activity that is closely related to the defendant's account of the events leading to his claim of consent,[155] (3) evidence used to prove the victim was a prostitute,[156] and (4) evidence used "to show the victim fantasized the event."[157]

The problem with the second approach is its potential for abuse. As some of the above exceptions indicate, clever defense attorneys can manipulate the exceptions' rather broad language. For example, the exception allowing past sexual conduct evidence if it is "relevant to any material issue or fact," deprives the rape-shield statute of its distinctive function in a rape proceeding because it is nothing more than a recodification of relevance.[158] The premise behind rape-shield protection, however, is that a rape victim's past sexual conduct is subject to special evidentiary rules beyond the regular rules of evidence discussing relevance. While the first approach risks exceeding the policies underlying rape-shield laws by completely depriving the defendant of his right to confrontation, the second approach retreats excessively from these policies by affording the victim inadequate protection. Montana should blend the virtues of these two approaches to effectuate the policies underlying rape-shield protection, while also respecting the defendant's position. A middle ground between the first approach's mechanistic application of the statute and the second approach's

153. *See, e.g.*, State v. Ray, 637 S.W.2d 708 (Mo. 1982)(en banc); MO. REV. STAT. § 491.015 (1989).

154. *See, e.g.*, CAL. EVID. CODE § 782 (West 1990); IDAHO CODE § 18-6105 (1990); VT. STAT. ANN. tit. 1, § 3255 (1989) (This statute requires that the probative value of the evidence outweighs its potential for prejudice to be admissable.).

155. *See, e.g.*, FLA. STAT. ANN. § 794.022(2) (West 1989); MINN. STAT. § 609.347 (1990); N.C. GEN. STAT. § 8c-1, Rule 412 (1990).

156. *See, e.g.*, IDAHO CODE § 18-6105 (1990); N.Y. CRIM. PROC. LAW § 60.42 (Consol. 1990).

157. *See, e.g.*, N.C. GEN. STAT. § 8c-1, Rule 412 (1990).

158. Compare the language of statutes allowing past sexual conduct evidence that is "relevant to any fact at issue" with rule 401 of the Federal Rules of Evidence, which states: "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." FED. R. EVID. 401. Allegations that the "relevant to any fact at issue exception" is buttressed by adding a balancing test of probative value against prejudicial effect are illusory because traditional rules of evidence already apply such a test to relevant evidence. *See, e.g.*, FED. R. EVID. 403.

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excessively broad exceptions will withstand constitutional challenge.

VIII. A Sensible Course for Montana to Chart

With the comparatively small number of Montana Supreme Court decisions interpreting Montana's Rape-Shield Statute, it is impossible to fit our court's present approach into one of the two approaches outlined above. The decisions do indicate, though, that the court is sensitive to the Montana Rape-Shield Statute's prohibitive character.[159] In the absence of any reference to a constitutional safeguard for the defendant in Montana's Rape-Shield Statute, the court has mechanically applied the statute, as in the first approach, to prevent the defendant from using evidence of the victim's past sexual conduct. The court has done this without serious consideration to the warnings issued in *Davis* and *Chambers*. However, the court has also shown characteristics of the second approach by hinting at two possible exceptions to Montana's Rape-Shield Statute that defense counsel could legitimately use in future sex crime cases in Montana.[160]

The Montana Supreme Court hinted at the first exception to Montana's Rape-Shield Statute in both *Higley* and *Lamb*. If the evidence involving the complainant's past sexual conduct would "control the outcome of the case," the court could allow it despite the rape-shield statute's prohibitions.[161] However, this exception finds its roots in rule 608(b) of the Montana Rules of Evidence, a traditional rule of evidence. The Montana courts must resist the temptation to retreat to traditional rules of evidence in creating exceptions to rape-shield statutes if Montana is to preserve its stringent rape-shield law.

The similarity between the "relevant to any material fact" exception contained in the Missouri and Kansas rape-shield statutes[162] and *Lamb*'s "control the outcome of the case" exception is

159. *See supra* notes 37, 47-48, 57 and accompanying text.

160. *Id.* The first exception, implicit in *Lamb*, would allow past sexual conduct evidence that "would control the outcome of the case." *See supra* note 37 and accompanying text. The second exception, formulated in *Anderson*, would allow evidence of prior false charges made by the victim that a court has already "adjudicated to be false." *See supra* notes 47-48 and accompanying text. The *Fitzgerald* decision did not create another exception to the statute. However, the court indicated that it is proper to weigh the probative value against the prejudicial effect of past sexual conduct evidence despite the absence of such language in the statute. *See supra* note 57.

161. State v. Lamb, 198 Mont. 323, 328, 646 P.2d 516, 519 (1982); State v. Higley, 190 Mont. 412, 424, 621 P.2d 1043, 1051 (1980).

162. *See supra* notes 152 and 153 and accompanying text.

alarming. The plethora of defense rationales purporting to come under this undefined Montana exception would be endless.[163] If rape-shield statutes must conform to traditional rules of evidence, then their distinctive protection for rape victims is lost. A narrower, more definable exception, designed specifically to accommodate the defendant's right to confrontation, avoids allowing more past sexual conduct evidence than is necessary. Providing Montana courts with a narrower, more definable exception to apply would arm them with adequate discretion to allow past sexual conduct evidence in those situations mandated by the United States Constitution.[164]

In *Anderson*,[165] the court implied another distinct exception to Montana's Rape-Shield Statute that involved prior sexual offense charges made by the complainant. Indeed, *Anderson* stands alone among Montana cases in recognizing the defendant's right of confrontation as potentially paramount to the victim's rights under Montana's Rape-Shield Statute.[166] This second exception, exemplified in *Anderson*, also reflects the need to give adequate discretion to the lower court. The court should prohibit the defense from introducing evidence of alleged prior charges that the defense cannot prove are false.[167] Conversely, the complainant should not use the rape-shield statute to prohibit the defendant from demonstrating to the court's satisfaction that the complainant made prior false charges.[168]

The *Anderson* court decided that the lower court should admit only evidence of prior sex crime charges already adjudicated to be false[169] and evidence that could be narrowed to the limited issue

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163. Because the language, "control the outcome of the case" is derived from a traditional rule of evidence, defense counsel would only have to satisfy traditional relevance standards and not the heightened standards demanded by rape-shield statutes.

164. U.S. CONST. amend. VI.

165. State v. Anderson, 211 Mont. 272, 686 P.2d 193 (1984).

166. *Id.* at 284, 686 P.2d at 200.

167. *Id.* at 284, 686 P.2d at 201. This is because the defense is offering past sexual conduct evidence only to give the jury the impression that the victim is sexually promiscuous.

168. Courts are deeply divided on this issue. *See, e.g.*, U.S. v. Cardinal, 782 F.2d 34 (6th Cir. 1986); Phillips v. State, 545 So. 2d 221 (Ala. Crim. App. 1989); State v. Hutchinson, 141 Ariz. 583, 688 P.2d 209 (Ariz. Ct. App. 1984); People v. Hurlburt, 166 Cal. App. 2d 334, 333 P.2d 82 (1958); Smith v. State, 259 Ga. 135, 377 S.E.2d 158 (1989); People v. Alexander, 116 Ill. App. 3d 855, 452 N.E.2d 591 (Ill. App. Ct. 1983); State v. Oliveira, 576 A.2d 111 (R.I. 1990); State v. Demos, 94 Wash. 2d 733, 619 P.2d 968 (1980). *See also* VT. STAT. ANN. tit. 13, § 3255(a)(3)(c) (1990)(The statute admits "evidence of specific instances of the complaining witness' past false allegations of violations of this chapter."); WIS. STAT. § 972.11 (2)(b) (1990) (The statute admits "evidence of prior untruthful allegations of sexual assault made by the complaining witness.").

169. *Anderson*, 211 Mont. at 284, 686 P.2d at 200.

of the witness's veracity.[170] This decision affords too little discretion for the lower court. If, for example, the defendant could show that the complainant had previously filed several rape charges, all dropped by the prosecution before trial, the court should have inherent discretion to allow the defendant to use this evidence.[171] Rape-shield law is legitimate to the extent that it protects an innocent rape victim from needless humiliation at trial. Rape-shield law is illegitimate when used so blindly that it shields the complainant from her prior false accusations.

The potential for rape-shield protection abuse is most evident in the illustration of Mr. *X* in the introductory paragraph.[172] The prosecution used evidence of the complainant's past sexual conduct to buttress its own case. The complainant, to negate the defense of consent, testified that she had no prior sexual experience. Applied mechanically, Montana's Rape-Shield Statute would bar the defendant from introducing evidence of the complainant's past sexual conduct to counter this maneuver.[173] However, once the state uses past sexual conduct evidence, the court should possess inherent discretion to permit the defense to rebut the state's evidence. The defendant is denied a fair trial if the defendant cannot use evidence to rebut the state's case. The court should place limits on the defendant's introduction of past sexual conduct evidence even when the state opens the door. Such limits will prevent the defense from using more past sexual conduct evidence than the court deems necessary to refute the state's evidence.[174] Such a situation illustrates why discretion is crucial to provide the defendant a fair trial, even in a stringent rape-shield protection scheme.

IX. Procedural Safeguards: Adequate Procedural Instructions Add Overall Legitimacy

Montana's Rape-Shield Statute contains a minimal procedural

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170. *Id.* at 284-85, 686 P.2d at 200 (citing Hall v. State, 176 Ind. App. 59, 374 N.E.2d 62 (1978)).

171. This would indicate that the defense is offering the evidence not to show the victim is sexually promiscuous, but to show the victim promiscuously files false sex crime charges.

172. *See supra* note 2 and accompanying text.

173. *See supra* note 3. The language of Montana Code Annotated section 45-5-511(5) (1989) clearly guards against only the defense's use of the evidence. The statute states:

> [i]f the defendant proposes for any purpose to use evidence described in subsection (4) [evidence concerning the sexual conduct of the victim] the trial judge shall hold a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (4).

MONT. CODE ANN. § 45-5-511 (5) (1989).

174. *See, e.g.*, State v. Camara, 113 Wash. 2d 631, 781 P.2d 483 (1989).

instruction requiring the court to hold a hearing outside the presence of the jury when the defense intends to introduce evidence of the victim's past sexual conduct.[175] The statute does not require that the defense make a written motion indicating the purpose for which the defense will use the evidence.[176] Additionally, the court is not compelled to make an order outlining specifically what evidence the court will admit and what limits the court will place on the defense's use of the evidence.[177] These procedural matters are not just formalities. The court, by controlling the amount and nature of the evidence admitted, can avoid hastily made rulings that are either too broad or too narrow in scope. A more thorough procedure that protects the defendant's constitutional rights would give greater legitimacy to the stringent rape-shield scheme suggested for Montana.

Federal rule 412 requires a written motion from the defense not later than fifteen days before the start of trial.[178] The "fifteen-day requirement can be waived if the court determines the evidence is newly discovered or would have been through the exercise of due diligence."[179] Accompanying this motion must be a written offer of proof demonstrating why the evidence qualifies for admission under the statute.[180] The court should hold an *in camera* hearing during which both counsel are permitted to call witnesses, including the alleged victim, to establish the admissibility of the evidence.[181]

This article will suggest a scheme that commits Montana courts to stringent rape-shield protection. Under the scheme, Montana courts gain greater discretion than is now afforded under Montana's Rape-Shield Statute.[182] The Montana courts, from the trial level to the supreme court, must respect Montana's interest in rape-shield law and refrain from adding any new exceptions to the statute. New exceptions simply dilute rape-shield protection for the victim. The cases from other jurisdictions show that no statute, by itself, anticipates all the conflicts that can arise between rape-shield law and the defendant's confrontation rights. This scheme discourages the piecemeal creation of broad exceptions to the rape-shield statute illustrated in *Colbath*. Instead, Montana courts will

175. MONT. CODE ANN. § 45-5-511(5) (1990).
176. *See, e.g.*, FED. R. EVID. 412(c)(1).
177. FED. R. EVID. 412(c)(3).
178. FED. R. EVID. 412(c)(1).
179. *Id.*
180. FED. R. EVID. 412(c)(2).
181. FED. R. EVID. 412(c)(1), (3).
182. *See infra* part (2) of proposed statute.

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receive inherent power to accept past sexual conduct evidence in those situations clearly required by the sixth amendment to the United States Constitution, or situations in which the evidence is needed to give the defendant a fair trial.

X. PROPOSED MONTANA RAPE-SHIELD STATUTE[183]

1. Provisions generally applicable to sexual crimes:[184]

(a) *Evidence of specific instances of conduct, opinion evidence, reputation evidence, relating to the alleged victim's sexual conduct before the alleged attack shall be inadmissible. However, the evidence is automatically admissible if it qualifies as:*

(b) Evidence of the victim's past sexual conduct with the offender.[185]

(c) Evidence of specific instances of the victim's sexual conduct to show the origin of semen, pregnancy, or disease which is at issue in the prosecution.[186]

2. *In addition to the exceptions contained in (1)(b) and (c), the court in its sound discretion may admit evidence of the nature contained in subsection (1)(a) in those circumstances where the evidence is so probative that to prohibit the evidence would deny the defendant a fair trial or deprive him of his constitutional right of confrontation.*[187]

3. *If either the accused or the victim intends to introduce evidence of the nature contained in subsection (1)(a), the party shall file a written motion to the court not less than fifteen days before the trial date.*[188] *The fifteen day requirement may be waived if the party satisfies the court that the evidence is newly discovered or would have been in the exercise of due diligence.*[189] *The motion shall be served on all parties involved.*[190] *The motion shall contain the nature of the evidence sought to be introduced by the party.*[191] If, during an *in camera* hearing, the court determines that the evidence is admissible under this section, *the court shall make a written order detailing any limits it deems necessary on the scope of such evidence.*[192]

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183. *Compare* Proposed Montana Rape-Shield Statute *with supra* note 3.

184. *See supra* note 3.

185. *Id.*

186. *Id.*

187. *Compare* WASH. REV. CODE § 9a.44.020(3)(d) (1989) and CONN. GEN. STAT. § 54-86f(4) (1989) *with* section 2 of proposed statute.

188. FED. R. EVID. 412(c)(1).

189. *Id.*

190. *Id.*

191. FED. R. EVID. 412(c)(2).

192. FED. R. EVID. 412(c)(3).

XI. CONCLUSION

Montana is fortunate because it has avoided major challenges to its rape-shield statute. However, by reviewing the attacks experienced in other states, it is apparent that Montana's Rape-Shield Statute is susceptible to serious constitutional challenges. This article is an exercise in preventative law, by preparing the Montana courts for an inevitable constitutional attack. From the experience of other jurisdictions, Montana can learn and minimize its own struggle with rape-shield law.

Under this article's proposed rape-shield scheme, Montana's method of protecting the rape victim considers the defendant's constitutional right to confrontation by meeting the standards set forth in the *Davis* and *Chambers* decisions.[193] With the discretion afforded the court, coupled with the procedural safeguards, the defendant's legitimate rights to a fair trial are adequately protected. In addition, this proposed rape-shield scheme keeps intact the rape-shield protection provided by Montana's current rape-shield statute. A thoughtful implementation of this scheme will encourage the reporting and prosecution of one of society's most emotional crimes by providing a compassionate atmosphere for the victim and a flexible truth-finding forum for the accused.

193. Davis v. Alaska, 415 U.S. 308, 319 (1974); Chambers v. Mississippi, 410 U.S. 284, 295 (1973). The U.S. Supreme Court recently commented on *Davis*, stating:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).